The inter link between copyright and innovation law commercial essay

Law

INTRODUCTION:

Publishing Ireland has over 100 members out of which professional book publishing companies are 93. The members of publishing Ireland have 458 full-time employees and 111 part-time employees. A figure of €86 million is the turn over annual sale of its members and out of which €55 million is of educational publication accounting. The publishing Ireland took an opportunity to respond to the Consultation Paper of the Review Committee. The publishing Ireland played a vital role to represent the Irish publisher's response to the height of proposals that terribly threatens the sectors viability. The sector continued making investments substantially on products which are innovative like enhanced e-books; author pays journals and multi content platforms. German courts illustrates in a recent case about the scale of the problem. " According to the 17 publishing groups who helped to build the case, the operators of the site earned more than $10 million annually from advertising and donations"[1]. The biggest issue publishers face right now, bar none, is free [books] crowding out paid, Brian Napack, President of Macmillan, told the Financial Times on the occasion of the London Book Fair in 2011, You go to Google and [unauthorised copies of] every one of the top 10 New York bestsellers are there. The top textbooks are there on the day they're published[2].

ECONOMIC CONTEXT:

Throwing light on the lacking of economic evaluation, according to the Hargreaves Review, it is noted that, discussions which are underpinning regarding copyright policy are often leading to a polarisation of visions

between user groups and right holders. The Consultation Paper exemplifies this polarised analysis by referencing stakeholders' interests and approach taken. It would be indefensible without reliable potential benefit of economic evaluation of proposed changes and also damage which may be done for the establishment of copyright industries in creative sector on which these industries rely to stand over far-reaching changes to the legislation. According to the report published by WIPO in 2012, data was presented from 30 national studies on the economic contribution of their respective copyright industries that had been completed up to end 2011. It found that the contribution to GDP varies significantly but averages around 5. 4%. Measured against the WIPO Report, the DKM study shows that Ireland ranks towards the high end in terms of total economic contribution[3]. The creative industries in Ireland are widely similar to those of United Kingdom. For the purposes of the current UK Government Copyright Consultation, CLA, the sister society of the ICLA – which represents literary publishers - along with ALCS, PLS and DACS, commissioned Price Waterhouse Coopers to provide an economic analysis of the impacts of copyright, secondary copyright and collective licensing in the UK (" the PwC Study")[4], and a supplementary report on the potential impact of proposed changes to the education exceptions in the CDPA (" the second PwC Study")[5].

THE INTER-LINK BETWEEN COPYRIGHT AND INNOVATION:

Innovation Ireland, the Report of the Innovation Taskforce, building upon a similar OECD definition, presented innovation as a key driver of productivity and central to economic development, and sought to develop a strategy to

place innovation at the heart of enterprise policy[6]. Encouraging innovation is all about encouraging new technologies, new business methods and new companies; and public policy is all about fostering an innovation ecosystem that will drive the development of a knowledge-based or smart economy in Ireland[7]. Copyright law is one of the pressures that will shape some of the outcomes of the process of technological innovation. As the Innovation Taskforce observed that the " regulation of intellectual property rights in Ireland plays a vital part of the overall legislative framework which promotes, protects and encourages innovation"[8]. As to the existing law, in Ireland, copyright is governed by the Copyright and Related Rights Act, 2000 [CRRA] (as amended)[9], and EU Directives, including the EU Copyright Directive [EUCD][10]. Submissions are broadly from 6 main categories. They are as follows: Rights-holdersCollecting societiesIntermediariesUsersEntrepreneursHeritage institutionsThese categories are not legal or formal definitions. For example, collecting societies could be seen as a subset of rights-holders, but they deserve separate treatment here because of the range of submissions relating specifically to them[11]. There are two possible drawbacks with this six-fold classification. First, the categories may be over-simplified or over- inclusive. For example, the interests of every member of any given category may not align with those of every other member; within the categories, different members may have different concerns, some may be subtle, some may be very clear, depending upon the issue. This is particular so in the category of intermediaries, where the interests of ISPs may not necessarily align with those of user-generated content platforms[12]. The second potential

drawback is with the classification of submissions into the six categories of rights-holders, collecting societies, intermediaries, users, entrepreneurs and heritage institutions, is that there may still be many gaps, either within or between the categories. It is particularly concerned to ensure that there are no significant gaps in this classification, and it would be grateful to learn if we have missed an important interest or category in the intersection of copyright and innovation[13].

Copyright Council of Ireland:

The main issue on which the submissions are invited is whether there should be a council of copyright of Ireland or not. The Paper correctly identified, number of areas in which the infrastructure of copyright is deficient. To remedy these would make a great difference to the Irish regime. However it is not to believe that the governance model proposed could successfully deliver the role described. It is also believed that a number of functions which matters are properly the responsibility of government and ought not to be allocated to a non-governmental body, particularly one which seeks to represent such diverse interests. In an addendum to this submission, the copyright infrastructure is in a range of common law countries. This shows the role of a Copyright Council in those countries[14]. There should be an Irish Digital Copyright Exchange to be included, to facilitate effective and comprehensive copyright licensing and a Copyright Alternative Dispute Resolution Service, to provide an independent and speedy alternative dispute resolution mechanism. It is considering inter-relationship between a Council and its alternative dispute resolution service, on the one hand, and the Controller of Patents[15]. The aim of the Copyright Council of New

Zealand is " to protect, preserve, develop and promote the rights of copyright creators and owners to New Zealand's best, long-term advantage"[16]and its members represent a wide spectrum of copyright creators and owners. The British Copyright Council " is a national consultative and advisory body" which represents various copyright holders and acts as a pressure group for change in copyright law at national, European and international levels. These councils are by and large privately funded through membership fees, publication sales, and seminars and so on[17]. Another example is the vexed issue of orphan works, which are works that are still protected by copyright but whose authors are not known or cannot be located or contacted after a diligent search to obtain copyright permissions[18]. The Council could develop appropriate standards to address some of the problems posed by orphan works16 (the Council might perhaps to define what constitutes diligent search and to allow good-faith use of orphan works subject to a license fee which would be paid to the owners of the works if they ever emerge)[19]. Submissions received about the notice-and-take-down provisions in Article 14 of the E-Commerce Directive and section 18 of the E-Commerce Regulations, 17 and in particular about the standards applicable to a possible counter-notice procedure which could result in the impugned content being put back online where it does not amount to an infringement[20]. The Council would be ideally suited to co-ordinate the development of standards both for notice-and-take-down procedures and for counter-notice- and-put-back procedures, at least in the context of copyright. Moreover, the EU Commission has recently announced that it plans to adopt a horizontal initiative on notice and action procedures,

and a Council could engage with the Commission on such a development[21]. One possible model for a statutory basis for an independent Council is the Press Council of Ireland[22]Ireland19 set up by the print media industry in advance of the enactment of the Defamation Act, 2009[23]. Section 44 and Schedule 2 of that Act allowed for the formal recognition of the Press Council, which duly followed in April 2010[24]. By contrast, the broadcast media are regulated by a statutory body, the Broadcasting Authority of Ireland [BAI][25], established pursuant to Part 2 of the Broadcasting Act, 2009 and publicly funded by the State[26]. The establishment of a statutory regulator, by analogy with the B. A. I.(though that is broadly the US model, where the US Copyright Office24 regulates, oversees and supports the US copyright system)[27]. Rather, taking up the submissions which are suggested with various collaborative and self-regulatory models, it can be suggested that the Irish copyright community may give some consideration to the establishment of a Council and that the Government might give consideration to providing statutory recognition to the Council, in both cases by analogy with the Press Council. Moreover, to continue that analogy, the legislative provisions should be relatively non-directive, setting out basic provisions, but letting the detail emerge in practice. To that end, some of the drafts proposed statutory provisions which were taken as their starting point to the relevant provisions of the Defamation Act, 2009. One of the key recommendations of a recent review in the United Kingdom was that the UK Government should encourage all of the relevant players to come together, within an agreed framework of rules, to establish a UK Digital Copyright Exchange [UK DCE] to facilitate speedy,

effective and comprehensive copyright licensing[28]. A range of incentives and disincentives would be needed to encourage rights holders and others to overcome divergences of interest to participate first in the formation of the UK DCE and then in its licensing schemes[29]. The UK government announced that it accepted and would implement all of the recommendations in that review, and has recently announced a consultation on specific proposals in that regard[30]. When it initially accepted the recommendations, the UK government specifically noted that it wants to see a " DCE, or something like it" established and it announced that Richard Hooper would lead a feasibility study on developing a DCE[31]and that process has recently commenced[32]. The Press Council has established the Office of the Press Ombudsman, to deal with complaints from members of the public against publications which are the members of the Press Council, and to seek and to resolve such complaints by Conciliation. If that is unsuccessful, the Ombudsman will take a decision, which can be appealed by either party to the Press Council. There is no charge to the complainant for this service. Moreover, unlike other similar Ombudsman services established under statute, the Press Ombudsman is established by the print media as part of the recognized self-regulating Press Council system[33]. It is considered that an ADR Service established by the Council could provide a voluntary dispute resolution process similar to that provided by the Press Ombudsman; but, unlike that process, we do not see a role for the ADR Service in taking decisions, or for the Council as an appeal body from the ADR Service. To that end, some of the draft proposed statutory provisions at the end of this chapter are modeled on some of the suggestions in the Law

Reform Commission’s Draft Mediation and Conciliation Bill, 2010[34]. Some foreign collecting societies are already registered with the Controller, but their registration is only for the purpose of collecting royalties in respect of those copyrights which their members have in Ireland under CRRA. The more complex question relates to the second issue, by which foreign collecting societies might register in Ireland to collect cross-border royalties in Ireland in respect of foreign copyrights or equivalent or related rights. This effectively requires a comprehensive EU framework for cross-border copyright licensing[35]." The recent UK review suggested that the UK government should support moves by the EU Commission to establish such a framework[36]. It was submitted to us that we ought to recommend the renegotiation of contracts in the event of windfall income from a work that was not envisaged at the time the contract was made, modeled on a German of 2002, which provides that where the contractually agreed remuneration is conspicuously disproportionate to the proceeds and benefits derived from the exploitation of the work, the other party shall be obliged, at the author's request, to consent to a modification of the agreement that grants the author further equitable participation appropriate to the circumstances"[37]. The US Congress has asked the US Copyright Office to consult on remedies for copyright infringement suits in small claims courts[38]. However, although there were many suggestions to this effect in the submissions, they were not fleshed out in any great detail. Several questions arise, including the nature of the jurisdiction and of the disputes that might be covered, and how it might dovetail with the existing small claims procedure for consumers in the District Court[39]. These issues are insurmountable. Moreover, we see

substantial merit in encouraging disputes too complex for the District Court to be litigated, where possible, in the Circuit Court rather than in the much more costly and cumbersome High Court. In particular, we see great merit in the creation of specialist copyright jurisdiction in the Circuit Court, with streamlined procedures appropriate to copyright disputes. Of course, there will still be many cases for which the High Court is the appropriate venue[40]. Not just copyright, many commercial disputes are often containing great issues. Issues of Intellectual properties are often hand in hand with issues of copyrights. They are not sealed hermetically. Where the part of dispute between two parties includes an issue of copyright, whole dispute should be solved with in the specialist jurisdiction. The rules of court are currently being reviewed, to the extent that they apply to intellectual property, to see how they could be streamlined to make litigation more efficient and cost effective, but the present Review affords the opportunity to go much further. For example, the County Court in the UK is broadly speaking equivalent to the Circuit Court in Ireland; there is a specialist Patents division in the County Court[41].

The right of first publication:

Section 34 CRRA relates to the right of first publication. Article 4 of EU Term Directive is implemented by section 34 of CRRA. It provides that any person, who, after the expiration of the copyright in a work, lawfully makes available to the public for the first time a work which was not previously made so available, shall benefit from a 25-year term of protection equivalent to the rights of the author[42]. It is self-evident that to the extent that potentially perpetual protection exists in an unpublished work, the right of first

publication cannot arise, thereby defeating the purpose of section 34. This problem will be cured if the issue of potentially perpetual copyright is dealt with effectively[43]. However, public dispute between Joycean scholar Danis Rose and the National Library of Ireland is another problem which is recently illustrated by section 34 relating to valuable unpublished Joycean material owned by the NLI. Section 34 in its present form is open to an interpretation which may allow a scholar or researcher, who is given access to scholarly material, to publish this immediately it comes out of copyright without the consent of the owner of the material, thereby securing the 25 year term and preventing the owner of the material from publishing the work[44]. It is imperative that it is clarified that the term " lawfully makes available", means that the consent to publication of the owner of the physical object in which the work is embodied is required. This is the case under UK law, where Article 4 of the Term Directive was implemented by regulations 16 & 17 Copyright and Related Rights Regulations 1996. These provisions make it clear that the right of first publication cannot be acquired by a person who publishes a previously unpublished work without the permission of the owner of the physical object in which the work is embedded[45].

Right-Holders:

Of the six categories in our classification, this is the most obvious one. Its first main constituents are the people who create the copyright work, from writers to artists to photographers to songwriters to software programmers. The first Copyright Act – the Statute of Anne, 1710 – was adopted, in the words of its long title, for " the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors ..." (emphasis added)[46]. In 1787,

the copyright clause of the US Constitution sought to " promote the progress of useful arts, by securing for limited times to authors the exclusive right to their writings"[47].). Irish courts see copyrights as constitutionally protected property rights, which allow copyright owners to benefit from their original works[48]. The situation of the individual author or artist is therefore a dominant trope in copyright lore; and it is particularly resonant in Ireland, given our strong cultural heritage and traditions in art, music and literature. Sometimes such creators seek to exploit their work directly. Sometimes, however, they are employees, such as when programmers in a software company write a piece of software, like a game or a search engine. In those cases, copyright vests in their employers unless otherwise agreed in their contracts of employment[49]. So, not only the individual creators but also the movie companies, investors, broadcasters and music companies are protected by Irish copyright law. The category of rights-holders is diverse, but, in general they benefit from the rights conferred by copyright law in two main ways: they can commercially exploit their works, and they protect the artistic integrity of their works. The two broad justifications for copyright track these reasons; and, in both cases, the connection between copyright and innovation is reasonably clear[50]. There is much labor involved in all of these Endeavour’s, and copyright law provides rights-holders legal protection for the fruits of their labors, thereby incentivizing them to produce their copyrightable works, especially works that others might value. This is particularly the case where the costs to the rights-holders of producing the works are high, but the costs of reproduction by others are quite low: copyright law incentivizes this production by the rights-holders and prevents

reproduction by others, for sufficient time to allow the rights-holders to recoup the costs of production and gain an adequate return. The potential reward provided by copyright therefore encourages innovation: if " authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work"[51]. Hence, the " creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work" Moreover, consumers also benefit from the availability of the work produced by the rights-holder[52]. The second main justification for copyright law also proceeds from the position of the rights-holder: copyright provides rights-holders legal protection for the artistic integrity of their works. It allows rights-holders to innovate artistically, in the knowledge that the law protects such intellectual expressions of their personalities. This is the basis of the moral rights in Chapter 7 CRRA. Moreover, society also benefits by the creation of work of potential economic value or cultural significance[53]. Article 5(2) of the Berne Convention provides that the enjoyment and the exercise of the copyrights it protects " shall not be subject to any formality", and this plainly excludes formalities such as registration. Hence, under Berne, copyright subsists in a work if it fulfills the basic test of originality; CRRA is compatible with the Berne Convention; and for so long as we adhere to it, there cannot add any formal registration requirements[54]. Section 21(1)(a) provides that if the relevant copyrightable work " is made by an employee in the course of employment", then the employer and not the employee owns the copyright, " subject to any agreement to the contrary"[55]. The issue of remedies for infringement is obviously of great

concern to rights-holders; but a proportionate set of remedies, and an appropriate set of procedures, are just as important to all parties to a dispute. This is reinforced both by our international obligations[56]and by our EU commitments[57]. EURLD provides for a Public Lending Remuneration scheme, by which authors receive payment for the loans of their books by public libraries. The Court of Justice of the European Union [CJEU] held that, by exempting all categories of public lending establishments from this obligation, Ireland had failed to fulfill its obligations under EURLD[58]. The gap was filled by the Copyright and Related Rights (Amendment) Act, 2007[59]. A similar point can be made with respect to the European Communities (Artist's Resale Right) Regulations, 2006 (SI No 312 of 2006), which allow artists to be paid a royalty of 4% of the value of their works sold for more than €3, 000 through the professional art market[60]. It was submitted to us that these Regulations improperly transposed the relevant EU Directive into Irish law, that they were a temporary measure which should now be replaced by a full legislative response, and that the value threshold should be lowered, the royalty increased, and the rights extended to artists' estates[61]. Again, while we see the merit in exploring this argument, some of the problems may already have been solved by the passage of time, and the issue does not constitute a barrier to innovation, so we do not consider that it is within our Terms of Reference[62]. Several submissions asked us to recommend amendments to CRRA which are beyond our Terms of Reference because they do not raise copyright issues. For example, some submissions asked us to extend CRRA to cover racing colures. To the extent that they are original works, they may already be covered by CRRA[63].

Collecting Societies:

Collecting societies give effect to rights-holders rights in a very important practical way, where copyright-holders have established such societies to grant licences in copyrighted works and collect copyright royalties for distribution back to the rights-holders. Hence, Chapter 16 CRRA provides for licensing schemes and licensing bodies; and EUCD observes that it is " necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency" (Recital 17 EUCD). Collecting societies are an important means by which rights-holders manage their copyrights and are rewarded for their investments and innovation[64].

Intermediaries:

Intermediaries run up against the copyright interests of rights-holders in several ways; and, as intermediaries' business models have developed, copyright law has been modified to accommodate their legitimate interests. One of the main questions for the present Review is whether the copyright balance between rights-holders and intermediaries now requires further amendment, in particular to incentivise innovation. Innovation Intermediaries facilitate innovation by bringing together a range of different players to facilitate and co-ordinate innovation. They can connect inventors with industry and users and bring new products and services to market. They therefore provide a wide and varied, even holistic, role for their clients in the innovation process. Technology can facilitate the potentially vast area of collaborative innovation, by bringing the various players together online. We

invite submissions as to whether copyright law inhibits this important process, especially the technological aspects of this process.

Users:

Copyright law seeks to balance the interests of rights-holders in protecting their monopoly against other legitimate interests in diversity. In particular, by protecting only " original" works, by preventing only " substantial" infringements, and by providing a range of exceptions, copyright law accommodates interests other than those of rights-holders, such as those of users. Together with many other common law jurisdictions, one of the main exceptions provided by CRRA is " fair dealing" (see in particular, sections 50-51, 221 and 329 CRRA). In many jurisdictions, case law is increasingly providing expansive interpretations of these exceptions, but it was submitted to us that the definition of fair dealing provided by section 50(4) CRRA cuts Irish law off from these developments[65]. In this Part, " fair dealing" means the making use of a literary, dramatic, musical or artistic work, film, sound recording, broadcast, cable program, non-electronic original database or typographical arrangement of a published edition which has already been lawfully made available to the public, for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright[66]. Many of the proposals in the Consultation Paper are of questionable legality in terms of Ireland’s Treaty obligations and the EUCD. In particular we refer to the lack of a mechanism for fair compensation and to the fact that the three-step test is incompletely and haphazardly applied in the proposals. The proposals constitute a patchwork of some 33 measures to loosen copyright protection. They constitute an unprecedented contest to

the property rights accorded to right holders by the European Convention on Human Rights and the Charter of Fundamental Rights of the EU.

Entrepreneurs:

The Innovation Taskforce was of the view that entrepreneurs and enterprises are at the heart of the innovation ecosystem because the success of the Irish economy depends on our capacity to translate ideas into exportable goods, services and sustainable jobs[67]. The Taskforce therefore placed the entrepreneur and innovative enterprises at the centre of their efforts to create the circumstances which would increase the number of indigenous start-ups[68], and they pointed to the important role of intellectual property law in this context[69]. Against this background, the present Review is concerned with the copyright aspects of intellectual property law as they have an impact on entrepreneurship and innovation. The recent UK review was commissioned to address the risk that the UK's intellectual property law was insufficiently well designed to promote innovation[70]; and, in that context, the UK government's response recognised that copyright law currently over-regulates to the detriment of the UK[71]. The text of Article 9(2) was distilled from typical features of copyright limitations in the Berne Member States in 1971, when it was added to the Convention. Article 13 of TRIPs and Article 10 of the WCT repeat this test, and it is incorporated in Article 5(5) EUCD. It falls into three obvious steps, relating to (i) certain special cases which (ii) do not conflict with a normal exploitation of the work, and which (iii) do not unreasonably prejudice the legitimate interests of the author.

Heritage Institutions:

Our cultural heritage from which much innovation can flow, copyright law raises particular issues for heritage institutions such as libraries, archives, galleries, museums, schools, universities and other educational establishments. Our first two Terms of Reference require us to recommend amendments to CRRA to remove barriers to innovation; and our fourth Term of Reference directs us to optimise the balance between protecting creativity and promoting and facilitating innovation. In this chapter, we consider our Terms of Reference in the context of heritage institutions, the last of the six categories into which we have divided then submissions. Article 5(3) (n) EUCD provides for an exception to or limitation upon the reproduction right and the communication right to allow for use by communication or making available, for the purpose of research or private study, to individual members of the public bydedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections. Finally, if a new section 198A CRRA is introduced, the question arises as to whether the reference to section 198 CRRA in section 2(1) of the Heritage Fund Act, 2001 ought to be amended to include a reference to any new section 198A CRRA? It was also submitted that section 73 CRRA (concerning " records which are open to public inspection") is ambiguously wide, but we do not see how amending the section would promote innovation.

Fair Use:

This term provides us with no standard against which to judge whether the doctrine would be " appropriate", but it seems clear from the context of the other Terms of Reference that the relevant standard is meant to be whether the absence of a fair use doctrine from Irish copyright law amounts to a barrier to innovation, and we will consider it in that light in this chapter. Fair Use offers a zone for trial and error, for bolder risk taking, with the courts providing a backstop to adjudicate objections from rights holders if innovators have trespassed too far upon their rights[72]. The rights afforded by copyright to rights-holders are not absolute, but are confined by a subtle structure of limitations and exceptions, and, as many of the submissions pointed out that the fair use exception was developed by the US courts as a safety valve upon the exclusive rights granted by copyright, permitting limited and reasonable uses without permission or payment. The recently UK review pointed out that in the US, fair use has allowed " sufficient flexibility to realise the benefits of new technologies, without losing the core benefits to creators and to the economy that copyright provides" especially " in a small number of cases which have been extremely important for the development of consumer technologies, notably those relating to reverse engineering, home video recording, and internet search caching and thumbnail images"[73].

Conclusion:

No Irish copyright survey would be complete without the obligatory reference to the timeworn story of the sixth-century judgment of Diarmaid, High King of Ireland, who held against St Columba in a copyright dispute with St Finian

of Clonard. Columba had illicitly copied a psalter in Finian’s scriptorium; and Diarmaid ordered Columba to deliver the copy to Finian: To every cow its calf and to every book its copy[74]. One important point has been missed. In the previous submissions attention is drawn to the fact that the exception made in section 50 CRRA regarding fair dealing is not useful for alignment with EUCD which is totally confined to non-commercial use only. It is also submitted that it is incontrovertible to Irish legislation to need a comparable amendment. It is referred to EU law and in particular EUCD at various points in the Paper, but the main issue on which possible changes to EU law arose was in regard to the fair use doctrine, and, for the purposes of discussion, we attempted to sketch what a fair use clause for Ireland might look like, having regard to developments elsewhere. It’s better to look forward to the next round of submissions, and to a final Report and draft Copyright and Related Rights (Innovation) (Amendment) Bill which, we hope, will establish Irish copyright law on a firm footing to encourage innovation, foster creativity, and meet the challenges of the future with confidence. It will, we hope, be an appropriate legacy for Diarmaid’s judgment in the dispute between Columba and Finian.